United States Court of Appeals

for the Second Circuit

APPELLANT'S PETITION FOR REHEARING EN BANC

75-7608

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 75-7608

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P/S

IRVING SANDERS, *Plaintiff-Appellee,*

—against—

LEON LEVY, *et al., Defendants-Appellants.*

EGON TAUSSIG, *Plaintiff-Appellee,*

—against—

SIDNEY M. ROBBINS, *et al., Defendants-Appellants.*

MICHAEL SHAEV and RITA SHAEV, *Plaintiffs-Appellees,*

—against—

ERIC HAUSER, *et al., Defendants-Appellants.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR DEFENDANT-APPELLANT OPPENHEIMER FUND, INC. ON REHEARING EN BANC

WEISMAN, CELLER, SPETT, MODLIN
& WERTHEIMER
Attorneys for Defendant-Appellant
Oppenheimer Fund, Inc.
425 Park Avenue
New York, New York 10022

Of Counsel
MILTON C. WEISMAN
GERALD GORDON

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The issues presented to the Court for review on rehearing en banc here are whether:

The majority then ruled that the notification costs

1. Whether the cost of notice, including the cost of identifying members of the class, was properly imposed on plaintiffs in the contested class action proceeding?

2. Whether the cost of identifying members of the class is governed by FRCP 33(c) and if so, whether such cost can be imposed on parties other than the plaintiffs?

STATEMENT OF THE CASE

This is an appeal under 28 U.S.C. 1291 by defendant. Oppenheimer Fund, Inc. (the "Fund"), and other defendants from so much of a decision and order of Judge Griesa dated September 30, 1975, filed October 1, 1975 (A-188-90) [1] of the United States District Court for the Southern District of New York as denied their motions for reargument of Judge Griesa's decision of May 15, 1975 (A-169-79). On June 30, 1976 a panel of this Court affirmed in part and reversed in part the order of the District Court. On September 14, 1976 a majority of this Court voted to grant reconsideration en banc.[2]

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[1] References to pages of the Joint Appendix are set forth as "A"-).

[2] The facts set forth on pages 3 through 14 herein repeat substantially verbatim the facts set forth in the same pages of the initial brief filed on behalf of the Fund.

A. The Nature of this Action

Between March and August, 1969, three separate substantially similar class actions were filed by plaintiffs, Irving Sanders, (A-10-21) Egon Taussig (A-22-37) and Michael and Rita Shaev, (A-38-46) respectively, naming as defendants the Fund, the Fund's investment adviser, Oppenheimer Management Corporation (the "Adviser"), Oppenheimer & Co. which controls the Adviser and the directors of the Fund. The complaints in the three lawsuits each charged that certain unregistered securities purchased by the Fund, an open-end investment company, were (1) acquired improperly and without adequate disclosure and (2) were valued improperly. The complaints also charged that management fees paid to the Adviser were excessive in that they were allegedly based on a false and exaggerated net asset value and investment performance. The suits, which do not seek damages from the Fund, (A-19-20, 35-36, 45) seek recovery of the alleged excessive management fees, cancellation of the investment advisory agreement and counsel fees for the attorneys for plaintiff, as well as damages suffered by plaintiffs and all other similarly interested shareholders. All three actions were consolidated on December 17, 1969.

In 1973, the defendants properly served filed amended answers (A-47-81) to the complaints, denying the

"In any class action maintained under

alleged unlawful and/or improper conduct and asserting affirmative defenses, among others, that there was fair, adequate and timely disclosure of the investments in investment letter securities, the value of such securities was determined in good faith by the Board of Directors of the Fund, and such value was the fair value of such securities in accordance with applicable law. In addition, the defendants, if held liable to plaintiffs by reason of overvaluation of restricted securities owned by the Fund, have asserted claims against plaintiffs for all amounts received by plaintiffs or to which plaintiffs are entitled to the extent such amounts were received by plaintiffs on redemptions of the Fund's securities as a result of overvaluation of restricted securities and setting off such amounts against any amounts for which defendants may be liable (A-55-56, 58, 70-72 80-82). Plaintiff Taussig was one of the shareholders who redeemed shares throughout the period designated by plaintiffs (A-112-13). Furthermore, as another affirmative defense, defendants other than the Fund have claimed an offset against the Fund for net amounts received by the Fund as a result of the alleged overvaluations against any damages to which they may be held liable to the Fund (A-57, 81); they did not file crossclaims against or ask for affirmative relief from the Fund.

be obtained, translated, if necessary, by the

B. The Class Action Motion

1. The Initial Motion

On March 30, 1973, plaintiffs served a notice of motion and supporting affidavit (A-116-128) for an order pursuant to Rule 23(c)(1) of the Federal Rules of Civil Procedure ("FRCP"), declaring that this consolidated action be maintained as a class action. In their motion papers, plaintiffs submitted that "any costs relating to the notice such as the preparation of the notice should be paid by the defendants since the defendants are better able to bear the cost of the notice" (A-127). Plaintiffs also suggested that the determination as to who should pay such costs or allocation thereof be deferred pending the submission of plaintiffs' motion for summary judgment [3] (A-127) and submitted that it would be a fair exercise of discretion for the Court under the circumstances of the case to require the defendants to pay the cost of notice (A-127).

The defendants responded to plaintiffs' motion, pointing out that the effort and expense involved in ascertaining and giving notice to the members of the

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[3] No such motion was ever made, probably because of the material issues of fact in dispute (See e.g. A-135-36).

class could be expected to be considerable since there were approximately 121,000 shareholders accounts which purchased Fund shares during the March 28, 1968 - April 24, 1970 period designated by plaintiff for determining members of the class (A-133). The Court was informed that it would require "considerable labor and expense to ascertain the names and addresses of all such purchasers, since the current list of shareholders of the Fund includes many who are not members of the class and a considerable number of members of the class are probably no longer current shareholders" (A-133-34). Furthermore the defendants objected to a mailing to all current shareholders, as suggested by plaintiff's counsel, because such a mailing would (1) not reach members of the class who are no longer shareholders, (2) be received by many shareholders who are not members of the class and be likely to cause substantial damage to the Fund and its shareholders by causing unsophisticated shareholders to panic and redeem their shares on the belief their investments are endangered, and (3) result in substantial cost (A-134). The defendants also pointed out that there was no showing plaintiffs would be able to reimburse defendants for such costs in the event plaintiffs did not prevail (A-135).

2. The Supplemental Information Following Eisen III.

On May 1, 1973 this Circuit decided Eisen v. Carlisle & Jacquelin, 479 F.2d 1005 (2d Cir. 1973), (Eisen III") vacated and remanded 417 U.S. 156 (1974) ("Eisen IV") in which it (1) held, among other things, that the class action involved in the Eisen litigation was unmanageable and did not satisfy FRCP 23 requirements and (2) reiterated its prior ruling that plaintiffs in such class actions should defray the cost of individual notice. At the hearing on the motion on May 23, 1973, defendants submitted an affidavit of an officer of the Fund and Advisor (A-138-41) which stated among other things, that there were over 173,000 current shareholders of the Fund, approximately 121,000 persons who purchased shares during the period designated by plaintiffs and at least 68,491 persons now shareholders who were not members of the class specified by plaintiffs (A-139). This indicated that there were about 16,000 persons whose shares had been entirely redeemed and were no longer shareholders. To avoid injury to the Fund, the officer urged that the mailing only be made to members of the class, pointing out the loss of investor confidence in the stock market in 1973 and the trend of redemptions in excess of sales of mutual fund shares, including those of the Fund (A-140).

3. The Discovery Relating to the Class Notice

On July 18, 1973, a full day was spent in Boston taking the deposition of the Fund's transfer agent, Investment Company Services Corporation ("ICSC") (A-195-257). The significant facts ascertained or affected by this deposition are as follows:

(a) As of August 31, 1973, the Fund had 171,195 shareholders of whom approximately 68,000 shareholders were not members of the class designated by plaintiffs. Accordingly, about 103,195 shareholders, as of August 31, 1973, were members of the class.

(b) There were approximately 121,000 present or former shareholders who were members of such class.

(c) There were approximately 17,800 shareholders who were members of the class and no longer shareholders of the Fund.

(d) The transfer agent, ICSC, could devise programs and procedures for determining the identity and addresses of members of the class. These programs would segregate current share-

holders who were members of the class from those who were not members.

(e) On the basis of rates in effect in 1973, the estimated cost, to ICSC, of establishing these programs and procedures, involving programming, key punch operations, computer time, card costs, supervision and other items approximated $16,580, exclusive of mailing costs. The costs of inserting the notice would amount to one cent per insert so that a separate mailing of a card with the shareholder's name imprinted thereon and the notice would be $2,420 (two inserts) and $9,680 in first-class postage (based on the then first class rate of eight cents an ounce and exclusive of the cost of printing the notice and envelopes). Thus, the total cost of a separate mailing by plaintiffs in 1973 would have required an approximate outlay of $28,500 by them.

4. The Modification Sought by Plaintiffs To Avoid the Cost of Notice

In December 1973, plaintiffs sought to modify their class action application relating to the description of the class by excluding persons who purchased shares during the

period designated by plaintiffs who no longer were shareholders of the Fund (A-142-50). By this application, plaintiffs sought to (1) avoid complications raised by defendant's affirmative defense for setoffs on redemptions of such shares to the extent the redemptions were at excessive prices caused by the alleged overvaluation of restricted securities and (2) eliminate the cost of notice to these persons and reduce the overall costs of notice which would otherwise be in excess of $20,000 (A-143-44). Plaintiffs claimed the proposal, if permitted, would also facilitate the distribution of any recovery -- only to existing shareholders (A-144). Furthermore, in order to substantially reduce their costs of notifying the class originally designated by them, plaintiffs proposed that the class notice be inserted in a regular mailing to all shareholders of the Fund (approximately 171,000 persons of whom only 103,000 were members of the class) (A-145-46). Plaintiffs were willing to pay the one cent per insert charge and the expense of preparing the notice, estimated to cost approximately $5,000 (A-147). Plaintiffs unequivocally stated that, if required to pay the costs of ascertaining the members of the class and mailing notice solely to them at an expense in excess of $20,000, they could not afford to pay such cost and would be "unable to continue prosecution

of this consolidated action as a class suit" (A-144). Plaintiffs reiterated that they "are not in a position to agree to pay the costs of notice in this amount" (A-149).

These applications by plaintiffs were vigorously opposed by the defendants who insisted that plaintiffs be required to send notice directly and only to members of the class originally designated by plaintiffs if the Court ruled that the class action was manageable. The defendants pointed out the impropriety of sending notice to 68,000 persons who were not members of the class -- 40% of the Fund's existing shareholders -- and also the prejudice to the class members proposed to be excluded as well as to the Fund by a possible multiplicity of new suits. Subsequently, in July 1974, additional information was provided to the Court as to mailings by the Fund and memoranda were submitted as to who must bear the cost of discovery of identifying members of the class.

C. The Rulings of the District Court

On May 15, 1975, Judge Griesa filed an opinion on the class action motion (A-169-79). In his opinion, Judge Griesa (1) ruled that "the Fund is to be responsible for whatever work and expense is involved in providing the list of class members to plaintiffs" (A-170), (2) required

the plaintiffs to mail the necessary notices and bear such costs and (3) denied plaintiffs' application to reduce the size of the class. (A-174-75) The Court in the same opinion subsequently held that "the cost of culling out the list" of class members ... is the responsibility of defendants" (A-175) and that "it is the responsibility of defendants to cull out from their records a list of all class members and provide this list to plaintiff" (A-178). The Court had ruled that this "expense is relatively modest and it is defendants who are seeking to have the class defined in a manner which appears to require the additional expense." (A-175). The Court, noting defendants' estimate that the average recovery would range between $2.00 and $24.00 per shareholder and plaintiffs' claim that such averages were misleading, [4] also ruled that it would be inappropriate for it to declare the class claim unmanageable at this time (A-173-74).

All of the parties moved to reargue the Court's decision of May 15, 1975. In its motion, the Fund pointed

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[4] Based on Plaintiffs Further Answers to Interrogatories (which interrogatories were dated February 7, 1973) filed in October, 1975, the average damage claim appears to be $12.24, obtained by dividing the estimated damages of $1,481,000 claimed by plaintiffs (A-159-60) by 121,000 shareholders.

out the rulings were unclear whether the Court intended that the Fund alone bear the entire cost of culling or whether the defendants should bear the cost pro rata. The Fund argued that if the Court did not impose the cost of culling on the plaintiffs, it should (1) clarify its rulings as to which of the defendants are to bear such costs, (2) rule that such costs are taxable costs in favor of the prevailing party and (3) order plaintiffs to put up a bond in the amount of the estimated costs to protect the interests of the Fund (and its shareholders) if the Fund prevailed on the merits; otherwise the Fund would find it impossible to obtain reimbursement in such event. The Fund also requested that if the Fund be required to bear such costs, the Court's ruling should set forth that the payment at this time is an advance and that there had been no determination on the issue of contribution.

On October 1, 1975, Judge Griesa filed a so ordered memorandum, dated September 30, 1975 (A-188-90), in which he denied all motions to reargue, except that he permitted plaintiffs to have the option of including the notice in a regular mailing of the Fund, provided the notice was only sent to class members, with plaintiffs to bear the costs of mailing, including the cost of segregating the envelopes going to class members from the envelopes going to other Fund

shareholders. The Court also ruled that the costs of culling the list of class members should be borne by the Fund without prejudice to the Fund's right at the conclusion of the action to make whatever claim it would be legally entitled to make regarding reimbursement by another party.

D. The Panel Decision

On June 30, 1976, a panel of this Court consisting of Circuit Judges Mulligan and Hays and District Judge Palmieri sitting by designation affirmed in part and reversed in part the decision below. In an opinion written by Judge Palmieri the panel unanimously agreed that the order below was appealable and that at this stage the action was not unmanageable, but disagreed, with Judge Hays dissenting, as to the allocation of identification costs.

With respect to appealability, the panel reasoned that the order requiring the Fund to bear the identification costs was appealable under the collateral order doctrine of Cohen v. Beneficial Loan Corp., 337 U.S. 541 (1949). The panel held that an order imposing notice costs on defendants is a final disposition of a claimed right which is appealable under the controlling authority of Eisen IV (Op. 4580).[5]

[5] The panel decision is cited as "Op." followed by the slip sheet page number. In their petition for rehearing, plaintiffs have not renewed the appealability issue covered in the Fund's initial brief and reply brief, undoubtedly because of the panel's unanimity in accepting jurisdiction. Therefore, we do not deem it necessary to repeat such arguments herein.

With respect to the allocation of identification costs, the majority noted that "the possibility that plaintiff may not be required to defray the cost of notice is still an open question in some cases" (Op.4581-82). It noted that the Supreme Court in Eisen IV had not attempted to "elucidate the exceptional case in which a representative plaintiff might be relieved of this burden" and that "[I]ndeed, it did not equivocally state that there was such a case" (Op. 4582). The majority then discussed the Supreme Court's analagous reference to stockholder derivative suits as the possible exceptional case where the corporation was in a nonadversary relation to the plaintiff and would benefit from any recovery. However, in the majority's view, the relationship between the plaintiffs and the Fund was non-adversarial

> "in a manner that makes it totally improper to impose costs on the Fund. The Fund is not a party to the class action claims. No recovery is sought from the Fund in the class action. The plaintiffs have been careful to exclude the Fund itself from all allegations of wrongdoing and to seek recovery only from its directors, its managing company and the broker-dealer firm that controls the manager. Indeed, the Fund appears to have been named as a defendant only for purposes of the derivative claims which are not of concern here. Since the Fund has no direct interest in the outcome of the class action claim, it is too remotely involved to have notification costs imposed upon it" (Op. 4583-84).

The majority then ruled that the notification costs could not be shifted on the other defendants since many of the considerations suggested as justification were inappropriate, e.g. weighing the merits of the action, discontinuance of the suit by plaintiffs and ability of defendants to bear the costs. (Op. 4584). It concluded that there were "no special circumstances in this case that would warrant shifting the costs of notification from the plaintiffs to any of the defendants" (Op. 4585).

The majority also analyzed the District Court's justification for imposing he costs on the Fund. In the first instance it ruled that the "relatively modest" expense was an inappropriate consideration even if such expense forced plaintiffs to discontinue. It next rejected the argument that defendants themselves had defined the class in a manner requiring additional expense. It also sustained as legitimate the defendants' objections to a mass mailing of the class notice to all shareholders of the Fund because of the possible prejudicial impact on the Fund (Op. 4586-87). The majority ruled that the cost of identifying members of the class was part of the cost of notice and not subject to the rules of discovery. In any event, the majority held it was unlikely that the rules of discovery "would require that defendants bear the identification costs here" (Op. 4587), citing FRCP 33(c), since the

information needed by plaintiffs was available to them (Op. 4588).

Judge Hays, on the other hand, took the position that the majority's decision "uncritically treats a discovery issue as notice and indiscriminately applies a rule appropriate to arms-length relationships to the fiduciary relationships between the parties herein" (Op. 4591). He reasoned that the expenses related to information allowing a party to proceed with a suit which is governed by discovery rules and that the discretionary judgment of the District Court should not be upset (Op. 4593-94). Furthermore, if the costs were part of the notice process, he argued that the fiduciary duties owed the plaintiffs by defendants justified an exception to the usual rule on cost of notice to insure that breaches of fiduciary duties were not shielded from redress (Op. 4595-97).

Finally, the panel concluded that the class order designation was reviewable because the class action order was properly before the Court on another ground and that such provisional designation was proper (Op. 4589-90).[6]

RULES INVOLVED

Rule 23(c)(2) of the FRCP provides as follows:

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[6] While we believe the manageability issue raised in our initial brief justified dismissal of the class suit brought by plaintiffs, we rest on the arguments in favor of dismissal set forth in such brief instead of reiterating it herein in the event the full bench desires to reach that question.

"In any class action maintained under subdivision (b)(3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (A) the court will exclude him from the class if he so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusions; and (C) any member who does not request exclusion may, if he desires, enter an appearance through his counsel."

Rule 33(c) of the FRCP provides as follows:

"Option to Produce Business Records. Where the answer to an interogatory may be derived or ascertained from the business records of the party upon whom the interrogatory has been served or from an examination, audit or inspection of such business records, or from a compilation, abstract or summary based thereon, and the burden of deriving or ascertaining the answer is substantially the same for the party serving the interrogatory as for the party served, it is a sufficient answer to such interogatory to specify the records from which the answer may be derived or ascertained and to afford to the party serving the interrogatory reasonable opportunity to examine, audit or inspect such records and to make copies, compilations, abstracts or summaries."

Rule 34(a) of the FRCP provides as follows:

"Scope. Any party may serve on any other party a request (1) to produce and permit the party making the request, or someone acting on his behalf, to inspect and copy, any designated documents (including writings, drawings, graphs, charts, photographs, phono-records, and other data compilations from which information can

be obtained, translated, if necessary, by the respondent through detection devices into reasonably usable form), or to inspect and copy, test, or sample any tangible things which constitute or contain matters within the scope of Rule 26(b) and which are in the possession, custody or control of the party upon whom the request is served; or (2) to permit entry upon designated land or other property in the possession or control of the party upon whom the request is served for the purpose of inspection and measuring, surveying, photographing, testing, or sampling the property or any designated object or operation thereon, within the scope of Rule 26(b)."

ARGUMENT

POINT I

THE NOTIFICATION COSTS, INCLUDING THE COST OF IDENTIFICATION, WERE CORRECTLY IMPOSED ON PLAINTIFFS.

The majority of the panel correctly ruled that the cost of identifying members of the class is part of the cost of notice required by FRCP 23(c)(2) and is not subject to the discovery rules. It is obvious that notice cannot be given until the recipient is identified and that plaintiffs in contested class action proceedings have the responsibility to both identify and notify those intended recipients. The members of the class defined by plaintiffs can readily be identified and individually notified, but plaintiffs are unwilling to bear their Rule 23(c)(2) obligation. As noted by District

Judge Canella, this obligation requires a reasonable effort by plaintiffs to identify class members. Popkin v. Wheelabrator-Frye, Inc., CCH Fed. Sec. L. Rep. § 95,411 at 99,090 (S.D.N.Y., January 12, 1976).

In connection therewith, we submit that the majority of the panel correctly rejected plaintiffs' proposal under which class members would not be identified, but instead notice would be sent to all of the Fund's shareholders so that thousands of shareholders who are not members of the class would receive notice. That method would clearly have an adverse effect on the Fund, as noted by the majority. See Dolgow v. Anderson, 43 F.R.D. 472, 501 (E.D.N.Y. 1968) where the court recognized that "the notice provisions themselves may prove harmful to defendants." It would also constitute an improper modification of plaintiffs' Rule 23(c)(2) obligations. This Circuit in Eisen III clearly and specifically reiterated its prior ruling in Eisen II [7] that "[I]f identification of any member or members of the class can readily be made, individual notice to these members must be given and Eisen must pay the cost", 479 F.2d at 1015. The Supreme Court in Eisen IV held that the unmistakable import of Rule 23(c)(2) required that "individual notice must be sent to all class members whose names and addresses may be ascertained through reasonable effort," 417 U.S. at 175, and

[7] Eisen v. Carlisle & Jacquelin, 391 F.2d 555 (2d Cir. 1968).

can be tailored to fit the pocketbooks of particular plaintiffs." Id. at 176. Thus, the majority of the panel correctly ruled that plaintiffs here must identify members of the class and bear the costs relating thereto.

The majority of the panel was also correct in stating that it would require an exceptional case to shift the burden of notice from the class representative to defendants in the class action. Contrary to plaintiffs'-appellees' argument in their petition for rehearing, the Supreme Court certainly did not mandate or even suggest that a broad arena of situations existed in which defendants would be required to pay notification costs. It only noted that the District Court in Eisen had cited exceptions where a fiduciary duty pre-existed between the plaintiff and defendant, as in a shareholders' derivative suit, 417 U.S. at 178, but expressed no opinion on the proper allocation of cost in such cases. It also clearly imposed the cost of notice on plaintiffs where the relationship between the parties was truly adversarial. Id. at 178-79. Thus, if indeed the Supreme Court suggested there were exceptions, it certainly granted no leeway to shift notice costs to a non-party defendant in the class action, e.g., the Fund, a factor apparently overlooked by the dissenting Judge, but not by the majority.

In that respect, plaintiffs-appellees are factually incorrect in their petition for rehearing (p. 7) and their

brief (p. 6) since the other defendants in this action have not asserted cross-claims against the Fund in their respective amended answers (A-57, 81). These defendants have only asserted affirmative defenses in the nature of an offset against the Fund as to any damages to which these defendants may be held liable to the Fund. The majority of the panel has thus correctly concluded that the Fund has no direct interest in the outcome of the class action claims since no damages are sought against the Fund by the plaintiffs. As noted by the majority,

> "No recovery is sought from the Fund in the class action. The plaintiffs have been careful to exclude the Fund itself from all allegations of wrongdoing and to seek recovery only from its directors, its managing company and the broker-dealer firm that controls the manager. Indeed, the Fund appears to have been named as a defendant only for damages of the derivative claims which are not of concern here" (Op. 4583).

Accordingly, for purposes of Rule 23(c)(2), it is immaterial that the other defendants have asked for an offset against the Fund.

Plaintiffs rely heavily on Dolgow v. Anderson, supra, which the Supreme Court in Eisen IV noted as a case in which a fiduciary duty pre-existed, one of the exceptions cited by the District Court in the Eisen case. But the Supreme Court stated in Eisen IV that it expressed no

opinion on the proper allocation of the cost of notice in such cases. 417 U.S. at 178. Indeed, the Dolgow case terminated with summary judgment for defendants; the case was held not to be a proper class action. See Dolgow v. Anderson, 464 F.2d 437 (2d Cir. 1972). The greatest value of Dolgow may be the reminder that the use of terms of themselves does not constitute proof, and therefore cannot be the basis for ignoring usual procedures in class actions.

The majority has also correctly avoided assuming that non-class member shareholders would favor the Fund financing these expenses for the benefit of other shareholders (Op. 4583). The Fund has a duty to these shareholders not to incur costs which the plaintiffs here may not be able to reimburse if plaintiffs fail to prove their claim. See Eisen III, 479 F.2d at 1020 (concurring opinion of Judge Hays).

As a matter of policy, therefore, the arguments raised by plaintiffs-appellees must be rejected insofar as they claim there should be a broad exception to the usual cost of notice rule. As cogently stated by District Judge Canella:

> "Given the choice between a rule which always imposes the cost of notice upon the plaintiff and one which always imposes it upon the defendant, this Court believes that absent legislation to the contrary, a plaintiff who has chosen to commence a class

> action lawsuit must accept the concomitant responsibility of initially paying for the cost of notice. In sum, there appears to be no equitably justifiable alternative to an across the board rule requiring plaintiff to pay the entire cost of notice. That such a rule will perforce prove an often insurmountable burden to class action plaintiffs is incontestable. Nonetheless, absent some device by the means of which a court could differentiate good faith suits with meritorious causes of action from unsubstantiated strike suits, no other rule would be acceptable." Popkin v. Wheelabrator-Frye, Inc., CCH Fed. Sec. L. Rep. §95,068 at 97,748 (S.D. N.Y., April 11, 1975).

We submit that the dissenting Judge's argument that the cost should be shifted because the relationship of the parties is truly fiduciary goes too far and assumes a breach of fiduciary duty, not merely an allegation thereof. The use of the term "fiduciary duty" in and of itself certainly does not solve the problem. To adopt an exception merely because certain fiduciary duties did exist between the parties, absent an admission of breach by the defendants, would fall within the "tyranny of labels" trap espoused by Mr. Justice Cardozo in criminal cases involving constitutional issues, e.g., Snyder v. Massachusetts, 291 U.S. 97, 114 (1934). As this Circuit pointed out in Eisen III:

> "Thus statements about 'disgorging' sums of money for which a defendant may be liable, or the 'prophylactic' effect of making the wrongdoer suffer the pains of retribution and generally about providing a remedy for the ills of mankind, do little

> to solve specific legal problems. The result of this approach is almost always confusion of thought and irrational, emotional and unsound decisions. In cases involving claims of money damages all litigation presumes a desire on the part of the judicial establishment to make the wrongdoer pay for the wrongs he has committed, but do do this by applying settled or clearly stated principles of law, rather than by some process of divination. Punishment of wrongdoers is provided by law for criminal acts in statutes making it a crime punishable by fine or imprisonment to violate the antitrust laws. In certain civil suits punitive damages may be awarded; and in private antitrust cases the possible recovery of triple the loss actually suffered by a plaintiff is very properly praised as a supplementary deterrent. But none of these considerations justifies disregarding, nullifying or watering down any of the procedural safeguards established by the Constitution, or by congressional mandate, or by the Federal Rules of Civil Procedure, including amended Rule 23. It is a historical fact that procedural safeguards for the benefit of all litigants constitute some of the most important and salutary protections against oppressions, including oppressions by those whose intentions may be above reproach. 479 F.2d at 1013.

As pointed out by the majority, the plaintiffs have here not established any exceptional circumstances warranting an exception to the rule that they must bear the Rule 23(c)(2) notification costs. This Court should not water down such a clearly established rule in the absence of congressional mandate or amendment of FRCP 23(c)(2). The plaintiffs, not defendants, have chosen the massive class in this case and must pay the price for such undertaking.

POINT II

IF THE COST OF IDENTIFYING MEMBERS OF THE CLASS IS GOVERNED BY THE DISCOVERY RULES, THEN PLAINTIFFS MUST STILL BEAR THE EXPENSE OF COMPILING SUCH INFORMATION.

Since the information needed by plaintiffs is not necessary for them to frame their complaint, e.g., to help meet their burden of showing that the elements of a class action are present, Wolfson v. Solomon, 54 F.R.D. 584, 591 (S.D.N.Y. 1972) we believe the majority was correct in holding the discovery rules inapplicable. Nevertheless, if the cost of identifying members of the class is governed by the discovery rules, we submit that FRCP 33(c) added in 1970 is clearly dispositive of such question and likewise mandates that such expense be imposed on plaintiffs. The information needed by plaintiffs to comply with their FRCP 23(c)(2) obligation is equally available to all parties and at the same expense. Therefore, the cost of examining the records and preparing the computer program to separately print out names of members of the class must be borne by plaintiffs under the controlling cases cited by the majority if such discovery rules are applicable.

The Advisory Committee's Note of 1970 to Rule 33(c) states that this "subdivision gives the party an option to make the records available and place the burden of research on the

party who seeks the information." The Fund has authorized the plaintiffs to examine the necessary shareholder records and, at plaintiffs' expense, to have the necessary program prepared so that notice will be sent only to members of the class designated by plaintiffs. The Fund cannot be compelled by plaintiffs to prepare programs which plaintiffs themselves can design by obtaining production of the necessary records which are available. Konczakowsky v. Paramount Pictures, 20 F.R.D. 588, 593 (S.D.N.Y. 1957). The information concerning shareholder purchases is on tapes (A-199-203) which can be printed out and examined by plaintiffs in order to compile the necessary list of members of the class; plaintiffs cannot compel the Fund to prepare such record. Tytel v. Richardson-Merrill, Inc., 37 F.R.D. 351 (S.D.N.Y. 1965).

While the dissenting Judge argued that FRCP 34 governs with the district court having discretion in making its determination, we submit that the same result would be mandated, i.e., plaintiffs bearing the cost and that a contrary result would constitute an abuse of discretion reviewable in this Court. Under FRCP 34, a party is not required to make copies and photographs for the convenience of its opponent. 4A Moore's Federal Practice § 34.19(3). It should likewise not be under the greater burden of preparing computer programs. The Advisory Committee's Note pointed out that parties would have a varying

burden from case to case to supply print-outs of computer data, with the courts having "ample power under Rule 26(c) to protect respondent against undue burden or expense, either by restricting discovery or requiring that the discovering party pay costs." 48 F.R.D. 527. See Adams v. Dan River Mills, Inc., 54 F.R.D. 220, 222 (N.D. Ill. 1971) where the court ordered the party seeking discovery to pay the cost of preparing a computer print-out and related information.

Furthermore, we submit that the information concerning shareholders has not been deliberately buried in the computer tapes to "immunize business activity from later scrutiny" as suggested by the dissenting judge (Op. 4593-94). We are in a computer age in which it would be irresponsible for the Fund with tens of thousands of shareholders to maintain its records concerning shareholders in manual books. Indeed, key punch programs to establish a list of members of the class is prepared faster from machine-produced records than handwritten records (A-211). The expense to plaintiffs here does not arise from any concealment of information by defendants; it emanates from the very nature of the lawsuits brought by plaintiffs in which the class defined by plaintiffs, i.e., each purchaser of Fund shares during the March 28, 1968-April 24, 1970 period, resulted in questions of manageability which were seriously urged by defendants before

the District Court and the original panel. Indeed, if the records were not kept in computer form, the plaintiffs would have to prepare their own list of class members, prepare 121,000 envelopes and separately mail the required notice, an expense they have stated they will not incur.

If plaintiffs chose to exercise their rights as shareholders under New York's Business Corporation Law, they would fare no better. Under Section 624(b) of that statute, shareholders may examine shareholders' records and make extracts; they cannot impose the requirement on the corporation to provide them with extracts or copies. See, e.g., Reichlin v. Wolfson, 47 F.R.D. 537 (S.D.N.Y. 1969), where plaintiff bondholders were held to have failed to use the proper discovery methods under Section 518 of the New York Busines Corporation Law to ascertain the number and identity of other bondholders to satisfy the numerousity requirements of their alleged class action.

Accordingly, plaintiffs must bear the cost of notice if the discovery rules are applicable to the cost of identification.

CONCLUSION

For the reasons stated, we believe that the result reached by the majority of the panel with respect to the

allocation of identification costs was correct and that such decision should stand as the holding of this Court en banc. We also believe that if the full bench desires to reach the question of manageability, it should reverse the order of the district court on the basis set forth in our initial brief and dismiss the class action upon the ground it is unmanageable.

Respectfully submitted,

WEISMAN, CELLER, SPETT, MODLIN,
WERTHEIMER & SCHLESINGER
Attorneys for Defendant-Appellant,
Oppenheimer Fund, Inc.
425 Park Avenue
New York, New York 10022
(212) 371-5400

MILTON C. WEISMAN
GERALD GORDON
of Counsel

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Appeal Docket No. 75-7608

IRVING SANDERS,

Plaintiff-Appellee,

-against-

LEON LEVY, et al.,

Defendants-Appellants.

EGON TAUSSIG,

Plaintiff-Appellee,

-against-

MICHAEL SHAEV and RITA SHAEV,

Plaintiffs-Appellees,

-against-

ERIC HAUSER, et al.,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF NEW YORK

CERTIFICATION OF SERVICE

I, GERALD GORDON, an attorney admitted to practice in this Circuit, do hereby certify that, on this 5th day of October, 1976, two copies of the Brief on Rehearing En Banc for Defendant-Appellant, Oppenheimer Fund, Inc., were hand-delivered to the following enumerated counsel at their respective addresses:

WOLF POPPER ROSS WOLF & JONES
Attorneys for Plaintiffs-Appellees
845 Third Avenue
New York, New York 10022

GUGGENHEIMER & UNTERMYER
Attorneys for Oppenheimer Management Corp., Oppenheimer & Co., Leon Levy and Jack Nash, Defendants-Appellants
80 Pine Street
New York, New York 10002

THACHER PROFFITT & WOOD
Attorneys for Defendants-Appellants, Edmund T. Delaney and Emanuel Celler
40 Wall Street
New York, New York 10005

DEBEVOISE, PLIMPTON, LYON & GATES
Attorneys for the American College of Trial Lawyers
299 Park Avenue
New York, New York 10017

Gerald Gordon

Gerald Gordon